Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1974

No. 74-895

VIRGINIA STATE BOARD OF PHARMACY, ET AL.,
Appellants,

v.

VIRGINIA CITIZENS CONSUMER COUNCIL, INC., ET AL.,
Appellees.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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ARGUMENT

The question raised by this appeal is whether there is a First Amendment "right to know" granting consumers a paramount right which invalidates prohibitions against advertising not only in the profession of pharmacy but in any of the professions.[1] This appeal by the Virginia State

[1] The statute invalidated in the instant case involved the profession of pharmacy. The fact that pharmacy is a profession affecting health and safety, *Patterson Drug Co.* v. *Kingery*, 305 F.Supp. 821 (3 Judge Ct., W.D. Va. 1969) was never contested. In fact, in the lower court, Appellees abandoned their Fourteenth Amendment claim that the statute had no relationship to the health and safety of the consumer. The First Amendment principle enunciated by the lower court is now being used to invalidate advertising prohibitions in other professions. *Public Citizens Health Research Group, et al.* v. *Commission on Medical Discipline of Maryland*, C.A. No. B74-56, U.S.D.C. Dist. of Md. See also *Consumer's Union, et al.* v. *American Bar Association and the Virginia Bar Association*, C.A. No. 75-0105-R, U.S.D.C., E.D. of Va., filed on February 27, 1975, attacking the prohibition against advertising attorneys' fees.

Board of Pharmacy raises a question that is conceded by Appellees (1) to be "substantial," (2) to meet "the requirements for plenary consideration by this Court" and (3) which is not properly subject to a motion to affirm.

Notwithstanding the conceded merits of the substantive issue presented, Appellees would have this Court dismiss the appeal because a motion made pursuant to Rules 52(b) and 59 of the Federal Rules of Civil Procedure to amend finding or for a new trial was not accompanied by a brief in accord with Rule 11(F) of the Local Rules of the United States District Court for the Eastern District of Virginia.[2]

The short answer to Appellees is that a motion for a new trial, regardless how they would substantively characterize it, was timely filed. The time for appeal was, therefore, tolled. The subsequent filing of a brief had no effect whatsoever on the efficacy of the motion nor therefore the time for appeal.[3]

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[2] Local Rule 11(F) is discretionary with the lower court and provides:

> "All motions, unless otherwise directed by the Court, except motions for (1) a more definite statement, (2) an extension of time to respond, unless the time has already expired, (3) production of documents, (4) compelling answers to interrogatories, (5) default judgment, (6) objections to interrogatories, and (7) motions relating solely to processes of discovery, shall be accompanied by a written brief setting forth a concise statement of the facts and supporting reasons, along with a citation of the authorities upon which the movant relies. The opposing party shall file his response, including a like brief and such supporting documents as are then available, within ten days thereafter. For good cause, the responding party may be given additional time or may be required to file his response, brief and supporting documents within such shorter period of time as the Court may specify."

[3] The subsequent filing of the brief is analogous to serving affidavits under Rule 59(c). The time periods when such affidavits must be filed are not within the prohibition of enlarging time periods as stated in Rule 6(b).

Appellee's present challenge to the timeliness of the Brief in Support of the Motion to Amend Findings or Judgment or in the Alternative for a New Trial was presented to and considered by the trial court which found it without merit. District Courts are authorized by Rule 83 to promulgate rules of procedure not inconsistent with the Federal Rules. Such courts have great discretion in applying their rules. *Lance, Inc.* v. *Dewco Services, Inc.*, 442 F.2d 778 (9th Cir. 1970); *U.S.* v. *Simmons*, 476 F.2d 33 (9th Cir. 1973). Indeed, where the interests of justice require, a court may waive its own rules. *Moore* v. *American Export Isbrandtsen, Inc.*, 56 FRD 565 (S.D. N.Y. 1972). Absent a showing of substantial prejudice, this action is not reviewable. *American Farm Line* v. *Black Ball Freight Service*, 397 U.S. 532, 90 S.Ct. 1288, 20 L.Ed.2d 547 (1969). As indicated, Appellees have not alleged, much less shown, any prejudice. Appellees' novel suggestion, that a motion never becomes a motion until joined with the brief, has never been, to Appellants' knowledge, accepted by any court. Indeed, where similar situations have arisen, the courts have proceeded to rule on the motion on the basis of that document itself, depriving the errant party of the opportunity to present a more developed argument. *Fort* v. *Daley*, 431 F.2d 1128 (7th Cir. 1970); *Woodham* v. *American Cystoscope Co.*, 335 F.2d 551 (5th Cir. 1964).

Moreover, it is standard practice in the Eastern District of Virginia, if a motion under Rules 52 and 59 is filed, to subsequently file a brief. Many times, the transcript of the trial must be examined, and this seldom can be transmitted to counsel within ten days.

Appellees also now assert that the motion lacks the requisite particularity under Rule 7(b)(1). Appellees then leap to the conclusion that if the motion lacks particularity, it cannot have been timely. In Appellants' opinion, such

bootstrapping would be illogical even if the motion were defective. The fact that the motion was filed tolls the time for appeal even if it is subsequently determined that the motion is fatally defective. *Leishman* v. *Associated Electric Wholesale Co.*, 318 U.S. 203 (1943). *Cf. Steinbower* v. *Scala*, 331 F.2d 366 (7th Cir. 1964).

In summary, once the motion was filed on April 1, 1974, all parties knew the case was still pending. Had Appellees wanted to accelerate the Court's disposition of the motion, they should have filed their response to the motion. That they did not, indicates that they concurred with the status of the case as pending. The motion was acted upon by the lower court and a timely appeal to this Court was noted. For the reasons previously stated, this Court should note probable jurisdiction and grant plenary consideration of the question presented.

Respectfully submitted,

VIRGINIA STATE BOARD OF PHARMACY, ET AL.

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CERTIFICATE OF SERVICE

I, Anthony F. Troy, Deputy Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of the counsel for the Virginia State Board of Pharmacy in the above-captioned matter, hereby certify that three (3) copies of this Appellants' Brief in Opposition to Motion to Dismiss have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office with first class postage prepaid, this 4th day of March, 1975, as follows:

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All persons required to be served have been served.

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